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No. 1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT GOULD and DOWLING BROS. DISTILLING COMPANY, a Kentucky corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The Government's brief over-simplifies the questions presented, thereby in effect implying a situation different from that disclosed by the record.

I. EACH INVOICE DOES NOT CONSTITUTE A SEPARATE "DELIVERY" WITHIN THE MEANING OF THE EMERGENCY PRICE CONTROL ACT

Each count of the indictment was based upon a separate invoice, but each invoice was not based upon a separate

sale, since the liquor involved in a single sale was usually invoiced to the purchaser in separate installments.

Respondent, however, argues that each invoice reflects a separate delivery, and that each delivery constitutes a separate offense under the Emergency Price Control Act. This contention ignores the fact that a single delivery may be made by installments, just as a single sale may be invoiced in separate installments.

The Emergency Price Control Act in Section 4(a) makes it unlawful:

> "for any person to sell or deliver any commodity . . . in violation of any regulation or order under section 2. . . ."

The purpose of this provision is to penalize either the sale of a commodity, or the delivery of a commodity after sale. Its purpose is not to multiply the offenses covered in a single sale simply because the delivery was made in installments. Following each sale which was made, the commodity was delivered in installments, each of which was invoiced separately. The total installments thus invoiced constitute a single delivery of the subject matter of the single sale. Otherwise, respondent might logically contend that there had been separate delivery not only for each invoice but for each case, package or bottle.

Shreffler v. *Bowles,* 153 Fed. (2d) 1, (C. C. A. 10), cited on Page 7 of the respondent's brief, holds that the statute of limitations does not bar an action under the Emergency Price Control Act where delivery of the article was made within one year before the commencement of the action, even though the actual sale was made more than one year before. Thus, the case has no bearing on the issue here presented.

II. THE CORPORATION CANNOT BE HELD LIABLE FOR THE ALLEGED CRIMINAL ACTS OF GOULD FROM WHICH THE CORPORATION DERIVED NO BENEFIT AND OF WHICH NO OTHER STOCKHOLDER, OFFICER OR AGENT HAD KNOWLEDGE

Respondent emphasizes the fact that petitioner's brother, Alvin Gould, was the only other substantial stockholder in the corporation. However, it must be pointed out once more that, during the period covered by the indictment, Alvin Gould was on active duty with the United States Coast Guard; that he was not indicted; and that there was no evidence from which it may be inferred that he knew anything of the acts charged against petitioner, Robert Gould. Certainly incriminating knowledge cannot be imputed to Alvin Gould from the bare fact that he was Robert Gould's brother, nor from the bare fact of his stock in the corporation, nor from his consent that Robert Gould act as directing head of the corporation while he was in the Service.

Petitioner earnestly submits that the trial court's charge to the jury (R. 911-912) would lead a jury of laymen irresistibly to conclude that the corporation was liable for the alleged illegal acts of Robert Gould solely because of his position as managing agent and stockholder therein. Furthermore, the trial court's undue emphasis on the fact that Alvin Gould, the other stockholder, was a brother of Robert Gould, would reinforce such a conclusion in the minds of the jury. This is especially true in the absence of any explanation by the trial court of circumstances under which a corporation might be responsible for the fraudulent or criminal acts of its representative.

Cases cited by the respondent in the footnote on Page 9 of its brief are irrelevant to this issue, since in each of

them the alleged illegal acts were performed to the profit and for the benefit of the corporation, whereas in the case at bar there is no evidence that any of the alleged illegal excesses paid to Robert Gould were passed on to the corporation.

Likewise, *Old Monastery Co.* v. *United States,* 147 Fed. (2d) 905 (C. C. A. 4), is far afield. That case dealt with acts committed by the president of the corporation, who purported to act as its representative and who issued its checks. As the Court said, 147 Fed. (2d) 905, 908:

> "There was other evidence tending to prove, and altogether consistent with the idea, that Ostrow, both in the negotiations and also in the carrying out of this contract for the sale of whiskey, acted, not as an individual, but in the role of president and representative of Monastery within the scope of his corporate capacity both actual and apparent."

In the case at bar, there is no evidence that, insofar as the illegal acts charged are concerned, Robert Gould purported to act on behalf of the corporation, or that the corporation benefited therefrom. While the corporation's offices were located at Burgin, Kentucky, the alleged illegal transactions occurred in Robert Gould's office at Cincinnati, Ohio. Robert Gould was a whiskey broker, and in this capacity rather than as a representative of the corporation, he was approached by the purchasers named in the indictment.

III. EVIDENCE OF ILLEGAL ACTS NOT CHARGED IN THE INDICTMENT AND FOR WHICH THERE HAS BEEN NEITHER ARREST NOR CONVICTION, MAY NOT BE INTRODUCED TO IMPEACH DEFENDANT'S CREDIBILITY

The indictment does not charge a conspiracy, a continuing activity or any offense in which continuing design,

motive or intent is a necessary element. So far as this indictment was concerned, the petitioner either made illegal sales or he did not make them. If he made them, then his act was wilful within the meaning of the statute. No issue of motive, intent or design was presented. Cross-examination of petitioner as to these extraneous acts was permitted by the trial judge on the admittedly mistaken assumption that the petitioner had testified flatly that he had never sold liquor at over ceiling prices. While the trial court later acknowledged its mistake, witnesses were nevertheless permitted to testify in rebuttal with respect to these extraneous acts.

No such theory as that now espoused by the respondent was adduced in the trial court; and, indeed, such a theory would have been wholly erroneous.

Proof of this contention is contained in the various cases cited on Pages 12 and 13 of respondent's brief.

In *Morris* v. *United States,* 123 Fed. (2d) 957 (C. C. A. 5), the issue was whether the defendant knew that a purchaser had bought paregoric for a drug rather than for a medicine. In *United Cigar Whelan Stores* v. *United States,* 113 Fed. (2d) 340 (C. C. A. 9), the issue was whether the defendant had, by selling denatured alcohol with knowledge that it was to be drunk, carried on a retail liquor business without payment of tax. Other cases cited by the Government all relate either to situations in which conspiracy was charged, or in which there was a continuing plan or scheme, or in which the defendant's intent was a necessary element in the offense, or in which the matters adduced on cross-examination or in rebuttal were, as the trial court here originally thought to be the case, opened up voluntarily by the defendant on direct examination.

In connection with this point, in two of the cases cited in the respondent's brief *U. S.* v. *Skidmore,* 123 Fed. (2d)

604 (C. C. A. 7), and *U. S.* v. *Montgomery*, 126 Fed. (2d) 151 (C. C. A. 3), cert. den. 316 U. S. 681, the following rule is stated (in the *Skidmore* case):

> "It (evidence of prior arrest) not only exceeded the limits of cross-examination and was purely collateral, but, if admitted, the answer would not have affected his character, *because a mere arrest furnishes no presumption whatever of guilt.*"[1]

and (in the *Montgomery* case):

> "We believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that *it is only conviction for felony or misdemeanor amounting to crimen falsi which are admissible to impeach a witness' credibility.*"

3 Wigmore, Evidence, 3rd Edition, Section 1005(a) says:

> "Particular acts of misconduct are not provable by extrinsic evidence to impeach moral character; they are also not provable merely in contradiction of the witness' statements on the stand; *except a judgment of conviction of crime, etc.*"

It was not, therefore, as respondent concludes on Page 12 of its brief, "proper for the Government to cross-examine Gould as to these matters." Instead, it was reversible error so to do, since he had never been convicted or even indicted for such matters.

Respondent's brief completely fails to support the proposition that evidence of collateral acts for which there has been no arrest or conviction, may be admitted against a defendant indicted for specific acts provable by direct evidence.

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[1] Emphasis supplied throughout is ours unless otherwise indicated.

CONCLUSION

The petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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